FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-433 **75-443**

HUGH CAREY, individually and as Governor of the State of New York, LOUIS J. LEFKOWITZ, individually and as Attorney General of the State of New York, ALBERT J. SICA, individually and as Executive Secretary of the Board of Pharmacy of the State of New York; and BOARD OF PHARMACY OF THE STATE OF NEW YORK,

Appellants,

against

POPULATION SERVICES INTERNATIONAL, DR. ANNA T. RAND, DR. EDWARD ELKIN, DR. CHARLES ARNOLD, THE REVEREND JAMES B. HAGEN, JOHN DOE and POPULATION PLANNING ASSOCIATES INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

A.

Appellees Population Planning Associates, Inc. and James B. Hagen have no standing to maintain this action.

Appellees Population Planning Associates, Inc. and James B. Hagen fail to allege an injury sufficient to war-

rant the exercise of jurisdiction in this case. The Board of Pharmacy has been aware of the activities of Population Planning Associates, Inc. since at least December 1, 1973 and yet has never initiated any legal action against it. Insofar as appellee Hagen is concerned, the Board of Pharmacy has not been aware of his activities at all. Moreover, there has been no prosecution under New York Education Law §6811(8) or any predecessor statute since 1965. Under these circumstances, neither appellee has alleged an "'injury in fact,' that is, a sufficiently concrete interest in the outcome of their suit to make it a case or controversy subject to a federal court's Art. III jurisdiction . . .". *Singleton* v. *Wulff*, 96 S. Ct. 2868 (1976) (court found injury to physicians where they had not been paid for rendered medical treatment). *Compare Planned Parenthood of Central Missouri* v. *Danforth*, 96 S. Ct. 2831 (1976) (recent statute, suit instituted 5 days after enactment); *Doe* v. *Bolton*, 410 U.S. 179 (recently enacted statute, fear of prosecution not chimerical); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968) (lack of justiciable controversy not urged by State, record lacking facts to warrant conclusion controversy is not live).

Even assuming an injury, appellee Population Planning Associates, Inc. is not a proper party to raise the privacy rights of third parties. Appellees have failed to cite a case where a comercial relationship between a seller and buyer was sufficient to permit the seller to raise the *privacy* rights of a buyer. *See Singleton* v. *Wulff, supra. Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 96 S. Ct. 1817 (1976), and *Bigelow* v. *Commonwealth of Virginia*, 421 U.S. 809 (1975), are not in point since they were first amendment cases where the parties involved were asserting their own first amendment rights.

B.

Every New Yorker has access to contraceptive products and New York State has reasonably limited their distribution by pharmacists and physicians where children under sixteen are involved.

New York in providing that only licensed pharmacists or physicians where children under sixteen are concerned may distribute contraceptives has merely regulated the sources from which individuals may obtain contraceptive products. The statutory scheme attacked by appellees does not reach the level of "governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child," *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972), and appellees' statement that "[t]his Court has made it manifestly plain that there is a constitutional privacy right . . . to have access to" contraceptive products is without support in the case law of this Court (Appellees' Brief, p. 21). Indeed, in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), this Court specifically held that the issue in that case concerned a right within the zone of privacy created by several fundamental constitutional guarantees since it involved the *use* of contraceptives by married couples and did not merely involve the regulation of their manufacture or sale. *Griswold, supra* at 485.

In short, a State may regulate access to contraceptives and such regulations must only be reasonable and bear some rational relationship to legitimate state purposes. Section 6811(8) meets this test. Moreover, as noted in appellants' brief, p. 21, even if measured by the strict scrutiny test, Section 6811(8) is constitutional.

The provision of Section 6811(8) which limits sale of contraceptive products by licensed pharmacists is reasonable since it assures that only persons of mature years will

be involved in the sales of such products* (2) permits purchasers to inquire as to the relative qualities of the products and prevents anyone from tampering with them and (3) allows enforcement of the remaining provisions of Section 6811(8) by State Board of Pharmacy inspectors (New York Education Law § 6804).

Appellees, in an attempt to overcome these reasons for the regulation and invalidate it, claim that the regulation has allegedly undesirable consequences since, among other things, there may be occasions when an individual cannot purchase contraceptives since a pharmacy may be closed and another outlet open. Moreover, the regulation may operate to keep the retail prices of the products artificially high.** Aside from the speculative nature of such claims, the fact that a regulation may not be all things to all people does not render it susceptible to constitutional attack as long as it is reasonable and rationally related to a legitimate state purpose.

Insofar as appellees argue for outright availability of contraceptives to children under sixteen, they have assumed without proving that such availability will lead to less unwanted pregnancies and a decrease in the incidence of veneral disease. However, the New York legislature could and did conclude that such unlimited availability would sanction and lead to increased sexual activity by

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* Appellees state that this argument was not raised below. However, appellants' memorandum before the three judge court (Defendants' Memorandum of Law, January 13, 1975, p. 4) specifically noted the concern of New York legislators that young clerks in supermarkets, who are frequently young girls, not be the victims of undesirable comments and gestures by permitting their exposure to individuals purchasing contraceptives (See debate on Assembly Bill 6843-B, April 18, 1974). Moreover, contrary to the assumption of the brief as *amici curiae* for Planned Parenthood Federation of America, Inc. and Association of Planned Parenthood Physicians, Inc. (pp. 23-24), Section 6811(8) limits the sale of contraceptive by licensed pharmacists only and does not permit sale by clerks employed by a pharmacist.

** This argument is raised in this Court for the first time.

very young persons, who frequently do not use contraceptives even if available, and instead of decreasing unwanted pregnancies and the incidence of veneral disease, would increase them.* Indeed, the briefs of the appellees and *amici* in this Court support this conclusion of the State legislature. For example, the brief of the appellees, p. 40, states that a demographic study of Nassau County, New York found that 79% of sexually active teenagers do not use contraceptives and that the 15-19 year old age group in Nassau County experienced a consistently rising number of pregnancies from 1971 to 1974. However, since most of these teenagers can readily purchase contraceptives from pharmacists, Nassau County having an abundance of pharmacies, these statistics only lend credence to the fact that youngsters will not use contraceptives even where available rendering the sanctioning of sexual activity most undesirable.

As for the studies cited by the brief of the American Civil Liberties Union, they have no bearing on the reasons for Section 6811(8) (pp. 14-15). Referring to a Los Angeles study, the brief relates that 96 percent of the girls studied were already sexually active when they came for contraception and 58 percent had been active for over a year. The brief recites that the inescapable inference from this data is that the request for contraception follows established sexual practices and does not stimulate it. How-

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* Appellees' brief (p. 42, footnote 18) erroneously asserts that appellants did not argue before the three judge court that increasing the availability of contraceptives increases sexual activity among children. This was exactly the point made before the three judge court. (Defendants' Memorandum of Law, July 13, 1975, pp. 18, 22, 24, 25). Moreover, the statement required by Rule 9(g) of the General Rules of the United States District Court for the Southern District of New York specifically put in issue appellees' contention that there is no evidence that teenage extramarital activity increases in proportion to the availability of contraceptives (65a), and appellees' reference to a statement made before the single district court judge was for the limited purpose of opposing the convening of a three judge court and for judgment on the pleadings.

ever, this inference, even if true, is irrelevant to the issue at hand since insofar as related in the brief, the study does not address itself to what prompted the sexual activity in the first place. It additionally points up the fact that notwithstanding availability, the girls had sexual intercourse at their risk. Moreover, New York youngsters may similarly go to clinics to obtain contraceptive products.

As for another study cited in the same brief based on a national probability sample of 411 adolescents aged 13 to 19, again this study is irrelevant to the issue at hand since it also fails to analyze the incidence of sexual activity *vis-avis* the availability to contraceptives. Insofar as the virgin adolescents answered that they had not had sexual intercourse, "Because I'm not ready for it", it appears that societal standards of morality will affect a youngster's decision whether to engage in sexual activity. Finally, the brief notes that fear of pregnancy is apparently not a deterrent to youngsters otherwise disposed to begin sexual activity and accordingly, the availability or non-availability of contraceptive products would have no effect on the number of unwanted pregnancies or incidence of venereal disease since there would be no incentive for their use.

The briefs submitted by the appellee and the *amici* in this Court are replete with citations of studies and statistical analyses regarding the sexual experiences and attitudes of children, making clear that the circumstances under which children should be permitted to purchase contraceptives is best left to the legislature and is not a question appropriately presented to a court.* Furthermore,

* The brief as *amici curiae* for Planned Parenthood Federation of America argues independently and on its own that Section 6811(8) denies minors under sixteen the equal protection of the laws (pp. 20-22). Apart from the complete lack of support in the record for its reading of the sections of the Social Services Law cited (See brief for appellants, footnote, p. 15) or the actual practice in New York, since this argument raises a question of the interpretation of a state law, a state court determination of this claim would obviate the need for a constitutional decision and this claim should be raised in the New York Courts in the first instance.

the reliance by appellees and *amici* upon these independent studies and analyses, none of which was testified to and subjected to cross examination at any trial, points up the fallacy of the district court's grant of summary judgment. The judgment of the New York legislature in the instant enactment cannot be ignored by the studies and analyses as if they were the last word.

C.

New York, consistent with constitutional guarantees, has properly barred commercial advertisement and display of contraceptive products.

Appellees' assertion that commercial speech is protected by the First Amendment does not suffice to invalidate the advertising and display provisions of Section 6811(8). For ". . . the difference between commercial price and product advertising . . . and idealogical communication permits regulation of the former that the First Amendment would not tolerate with respect to the latter." *Young* v. *American Mini Theatres,* 44 U.S.L.W. 4999 (U.S. June 24, 1976).

The legislation under attack at bar relates to purely commercial advertisement and display. It is a reasonable regulation since notwithstanding appellees' unproved assertions to the contrary, it protects individuals from displays and advertisements of contraceptive products that may be offensive and embarassing to many and, in particular, prevents the unnecessary exposure of New York youths to the "teenage mythology" that a teenager is "exceptional because he has not had sexual intercourse". Schofield, *The Sexual Behavior of Young People,* 256.

CONCLUSION

The order of the District Court granting appellees summary judgment should be reversed and judgment entered for the appellants.

Dated: New York, New York, November 24, 1976.

Respectfully submitted,

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